Re Benny Ong Swee Siang, ex parte United Overseas Bank (M) Bhd (formerly known as United Overseas Finance (M) Bhd)

HIGH COURT (PENANG) — BANKRUPTCY SUIT NO 29–435 OF 1998
LIM CHONG FONG JC
20 DECEMBER 2015

Bankruptcy — Discharge — Notice of intention by Director General of Insolvency ('DGI') to issue a certificate of discharge — Objection by judgment creditor — Failure by DGI to take proper steps to locate judgment debtor — Failure of DGI to undertake proper procedures — Exercise of DGI's discretion in issuing certificate of discharge — Whether certificate of discharge ought to be issued — Bankruptcy Act 1967 ss 15, 17, 33A, 33B(4), 33B(5), 40 & 69

The judgment debtor ('JD') was adjudged a bankrupt on 6 October 1998 following the creditor's petition filed by the judgment creditor ('JC'). Thereafter the JC filed its proof of debt. The Director General of Insolvency ('DGI') wrote twice to the JD at his last known address to attend a meeting but the JD did not respond and his estate was left un-administered. Consequently the DGI on 10 July 2012 issued a Form 51B notice of intention to issue a certificate of discharge in respect of the JD and the JC served its Form 51C notice of objection. The DGI rejected the JC's notice of objection on the grounds that the case had been administered for 16 years, the JD could not be located despite actions taken by the Insolvency Department, the JD has no known assets to be distributed to the creditors and no dividends could be declared to the creditors. The JC thus applied to court to prohibit the DGI from issuing a certificate of discharge to the JD under s 33B(4) of the Bankruptcy Act 1967 ('the Act'). The senior assistant registrar dismissed the JC's application and hence the present appeal. The JC contended that the certificate of discharge ought not to be issued because the JD's estate in bankruptcy has not been administered. The JD had been left to lead a normal life notwithstanding he had been adjudged a bankrupt.

Held, allowing the appeal:

(1) Pursuant to ss 33A and 33B of the Act, the DGI does not have the absolute discretion to issue the certificate of discharge. The DGI's exercise of the discretion is plainly subjected to the provisions in s 33B. It must be made judiciously depending on the circumstances of each case. Public interest, reason and justice demand that any statutory power must be exercised reasonably and with due consideration (see para 19).

(2) From the information furnished by the JC, it was clear that that the JD

had been and was still gainfully employed as a lecturer in Olympia Business School in Penang. In other words, he was traceable. The court was thus not satisfied that the DGI had utilised all reasonable endeavours to locate him including making internet searches in this modern day of information technology. From the evidence adduced, the DGI had merely written two letters to the JD, to wit: once in 1999 and again in 2012. No other attempts were made to procure his attendance at the Insolvency Department (see para 21).

(3) This was the situation of an un-administered estate in bankruptcy by reason that the procedures such as meeting of creditors, public examination of debtor and other administrative tasks as laid down in ss 15–17 and 40–69 of the Act had not yet been undertaken todate (see para 22).

(4) There had been no recovery of the judgment debt todate from the JD which ought to have been the dividends paid out from the realisation of the assets of the JD. If the certificate of discharge was issued, the JD would get off scot-free. It was also too late in the day for the JC to seek other modes of enforcement of judgment pursuant to O 45–52 of the Rules of Court 2012 by virtue of the Limitation Act 1953 (see para 23).

(5) It was just and expedient that the appeal should be allowed. Accordingly the DGI should forthwith procure the attendance of the bankrupt JD and commence the administration of the estate in bankruptcy (see para 24).

(6) Section 33B(5) of the Act had not been fully complied in that the bankrupt JD had not been served with the application and did not appear at the hearing or the appeal. The provision of service and appearance are only directory particularly in light of the special circumstances of this case. The attendance of the JD was immaterial here because the administration of the estate in bankruptcy had never even commenced at all (see para 25).

[Bahasa Malaysia summary

Penghutang penghakiman ('JD') telah diisytiharkan bankrap pada 6 Oktober 1998 berikutan petisyen pemiutang yang difailkan oleh pemiutang penghakiman ('JC'). Selepas itu JC memfailkan bukti hutangnya. Ketua Pengarah Insolvensi ('KPI') telah menulis dua kali kepada JD di alamat terakhir yang diketahui untuk menghadiri mesyuarat tetapi JD tidak bertindak balas dan hartanya ditinggalkan tanpa ditadbir. Oleh itu KPI pada 10 Julai 2012 mengeluarkan Borang 51B notis niat untuk mengeluarkan satu sijil pelepasan berhubung JD dan JC menyerahkan Borang 51C iaitu notis bantahan. KPI menolak notis bantahan JC bantahan atas alasan bahawa kes itu telah ditadbir selama 16 tahun, JD tidak dapat dikesan meskipun tindakan diambil oleh Jabatan Insolvensi, JD tidak mempunyai aset yang diketahui

untuk diagihkan kepada pemiutang dan tiada dividen yang boleh diisytiharkan kepada pemiutang. JC dengan itu memohon kepada mahkamah untuk melarang KPI daripada mengeluarkan suatu sijil pelepasan kepada JD bawah s 33B(4) Akta Kebankrapan 1967 ('Akta'). Penolong Kanan Pendaftar menolak permohonan JC dan oleh itu rayuan ini dibuat. JC menegaskan bahawa sijil pelepasan tidak sepatutnya dikeluarkan kerana harta JD dalam kebankrapannya masih belum ditadbir. JD dibenarkan untuk menjalani kehidupan yang normal walaupun dia telah dihukum bankrap.

Diputuskan, membenarkan rayuan:

(1) Menurut ss 33A dan 33B Akta, KPI tidak mempunyai budi bicara mutlak untuk mengeluarkan sijil pelepasan. Langkah KPI melaksanakan budi bicara tersebut jelas tertakluk kepada peruntukan-peruntukan dalam s 33B. Budi bicara tersebut mesti dibuat secara bijaksana bergantung kepada keadaan setiap kes. Kepentingan awam, alasan dan keadilan menuntut bahawa mana-mana kuasa berkanun perlu dilaksanakan dengan munasabah dan dengan pertimbangan yang sewajarnya (lihat perenggan 19).

(2) Daripada maklumat yang diberikan oleh JC, adalah jelas bahawa bahawa JD telah dan masih bekerja sebagai pensyarah di Sekolah Perniagaan Olympia di Pulau Pinang. Dalam erti kata lain, dia boleh dikesan. Mahkamah dengan itu tidak berpuas hati bahawa KPI telah menggunakan segala usaha yang munasabah untuk mencarinya termasuk membuat carian internet di zaman moden dan teknologi maklumat ini. Dari keterangan yang dikemukakan, KPI hanya menulis dua pucuk surat kepada JD, iaitu: sekali pada tahun 1999 dan sekali lagi pada tahun 2012. Tiada percubaan lain yang dibuat untuk memastikannya hadir di Jabatan Insolvensi (lihat perenggan 21).

(3) Ini adalah keadaan sebuah estet yang tidak ditadbir dalam kebankrapan oleh sebab prosedur seperti mesyuarat pemiutang, pemeriksaan awam penghutang dan tugas-tugas pentadbiran yang lain seperti yang ditetapkan dalam ss 15–17 dan 40–69 Akta masih belum dilaksanakan setakat ini (lihat perenggan 22).

(4) Sehingga hari ini, tiada dapatan semula daripada hutang penghakiman daripada JD yang sepatutnya menjadi dividen yang dibayar daripada realisasi aset-aset JD. Sekiranya perakuan pelepasan telah dikeluarkan, JD akan terlepas begitu sahaja. Adalah terlalu lewat untuk JC menuntut lain-lain cara penguatkuasaan penghakiman menurut K 45–52 Kaedah-Kaedah Mahkamah 2012 menurut Akta Had Masa 1953 (lihat perenggan 23).

(5) Adalah adil dan bersesuaian bahawa rayuan tersebut harus dibenarkan. Sewajarnya KPI perlu dengan serta-merta mendapatkan kehadiran JD

bankrap dan memulakan pentadbiran harta dalam kebankrapan (lihat perenggan 24).

(6) Seksyen 33B(5) Akta tidak dipatuhi sepenuhnya iaitu JD bankrap tidak diserahkan dengan permohonan tersebut dan tidak hadir dalam pendengaran atau rayuan tersebut. Peruntukan penyerahan dan kehadiran hanyalah direktori terutamanya berhubung keadaan khas kes ini. Kehadiran JD adalah tidak penting di sini kerana pentadbiran harta pusaka dalam kebankrapan tidak pernah pun dimulakan sama sekali (lihat perenggan 25).]

Notes

For cases on discharge in general, see 1(3) *Mallal's Digest* (5th Ed, 2015) paras 3292–3321.

Cases referred to

Endon Tamseran; ex p Parkash Singh Wasawa Singh, Re [2009] MLJU 57; [2009] 8 CLJ 379, HC (refd)
Public Bank Bhd v Kok Lee Wah [2004] 4 MLJ 433, HC (refd)
Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1991] 3 MLJ 28; [1991] 2 CLJ 1199, HC (refd)
Savrimuthu v PP [1987] 2 MLJ 173, SC (refd)
Siow Ah Moi @ Seow Yin Fong; ex p United Orient Leasing Co Bhd, Re [2007] 3 MLJ 713, HC (refd)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30; [1996] 1 CLJ 241, FC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 15, 16, 17, 33A, 33B, 33B(4), (5), 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, Form 51B, Form 51C
Limitation Act 1953
Rules of Court 2012 O 45, O 46, O 47, O 48, O 49, O 50, O 51, O 52, O 56

Gan Aiching (Lim Huck Aik & Co) for the judgment creditor.
Nurul Ain bt Mat Ariffin (Department of Insolvency) for the Insolvency Department.

Lim Chong Fong JC:

INTRODUCTION

[1] This is an appeal brought by the judgment creditor ('JC') against the decision of the senior assistant registrar dated 18 June 2015 refusing the JC's

application to prohibit the Director General of Insolvency ('DGI') from issuing a certificate of discharge to the bankrupt judgment debtor ('JD') under s 33B(4) of the Bankruptcy Act 1967.

[2] This appeal is essentially a rehearing of the application pursuant to O 56 of the Rules of Court 2012: see also *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30; [1996] 1 CLJ 241.

[3] Thus the relevant cause papers are as follows:

(a) JC's summons in chambers dated 12 February 2015;

(b) JC's affidavit in support affirmed by Yong Lap Soon dated 12 February 2015; and

(c) DGI's affidavit in reply affirmed by Dayang Siti Aminah bt Awang Aris dated 21 May 2015.

[4] I heard the appeal on 11 December 2015 and allowed it with no order as to costs. Accordingly I provide hereinbelow the grounds of my decision.

SALIENT FACTS

[5] The JD was adjudged a bankrupt on 6 October 1998 by the High Court following the creditor's petition filed by the JC.

[6] Thereafter the JC filed its proof of debt amounting to RM231,509.30 on 30 July 1999.

[7] The DGI on 6 January 1999 wrote to the National Registration Department and the Immigration Department notifying them of the bankruptcy. Also, the DGI wrote to the JD at his last known address to attend a meeting within seven days and to bring along copies of his list of assets, list of creditors and latest photograph.

[8] The JD did not respond to the DGI and his estate was left un-administered.

[9] Subsequently the DGI on 3 May 2012 wrote to various organisations including the JC's solicitors, Companies Commission of Malaysia and the Majlis Perbandaran Pulau Pinang for further information and details relating to the JD. The DGI also on the same date wrote to the JD at the same aforesaid address to attend a meeting and to bring along the same afore-requested documents.

[10] The JC's solicitors claimed to have responded to the DGI but the DGI claimed not to have received the response.

[11] Consequently the DGI on 10 July 2012 issued a Form 51B notice of intention to issue a certificate of discharge in respect of the JD and the JC on 16 July 2012 served its Form 51C notice of objection.

[12] The DGI responded to the JC on 29 January 2015 rejecting the JC's notice of objection on the grounds that the case has been administered for 16 years, the JD could not be located despite actions taken by the Insolvency Department, the JD has no known assets to be distributed to the creditors and no dividends can be declared to the creditors.

[13] As the result, the JC filed the notice of application that was heard by the learned senior assistant registrar on 18 June 2015.

CONTENTION OF THE PARTIES

[14] Before me, the JC in gist contended that the certificate of discharge ought not to be issued because the JD's estate in bankruptcy has not been administered todate. There has neither been a meeting between the JD and DGI nor creditor meeting convened. Hence, the bankrupt JD has been left to lead a normal life notwithstanding he has been adjudged a bankrupt.

[15] On the other hand, the DGI contended that the JD had been bankrupted for the past 17 years and quoted the case of *Re Endon Tamseran; ex p Parkash Singh Wasawa Singh* [2009] MLJU 57; [2009] 8 CLJ 379. In that case Ahmadi Asnawi JC (now JCA) said as follows:

> [14] In the exercise of its powers under s 33A(1) of the Act, the KP JIM is under no obligation to give reasons for so doing. However, in this case the KP gave all his reasons for wanting to discharge the bankrupt of her bankruptcy. It is perfectly within his discretion to do so and he is equally entitled to exercise his discretion to issue the certificate of discharge on those grounds. She was about 65 years old at the time PSWS01 was issued by the KP JIM on 4 November 2003. By now she would have been 70 years old. In a nutshell, on the uncontroverted facts it would serve no purpose whatsoever to prolong the bankrupt's bankruptcy any further. In the words of His Lordship Abdul Aziz bin Mohamad J (as he then was) in *Re Ah Kang* [1994] 2 CLJ 738 at p 740:
>
> Pada pendapat saya adalah bertentangan dengan kepentingan awam sekiranya seseorang itu terus kekal sebagai seorang bankrap sedangkan keadaan itu tidak memberi guna kepada sesiapa.
>
> I am on all fours with the views expressed therein.

The DGI further relied on the cases of *Public Bank Bhd v Kok Lee Wah* [2004] 4 MLJ 433 and *Re Siow Ah Moi @ Seow Yin Fong; ex p United Orient Leasing Co*

Bhd [2007] 3 MLJ 713 that a bankrupt may be released even before satisfying all the debts.

[16] The DGI also relied on the *Hansard* in relation to the parliamentary debate during the proposed amendment of s 33A of the Bankruptcy Act 1967 on 29 July 1998. The honourable Deputy Minister said as follows:

> Tujuan memasukkan seksyen 33A ini ialah untuk memudahkan seseorang bankrap mendapat pelepasan bagi kes-kes yang layak dan memberi peluang sekali lagi kepada bankrap berkenaan melibatkan diri dalam perniagaan dan perusahaan. Di samping itu, tujuan memasukkan seksyen ini juga ialah untuk menghapuskan kes-kes yang tidak boleh diteruskan lagi ... Tuan yang di-Pertua, kerajaan berpendapat bahawa telah tiba masanya beberapa peruntukan di bawah Akta Kebankrapan 1967 dipinda menyesuaikan dengan perubahan semasa dan bagi mengatasi masalah yang dihadapi oleh kerajaan dalam mentadbir kes-kes kebankrapan lama yang tidak aktif ... kes-kes yang tidak aktif ini sepatutnya telah pun dilepaskan tetapi Akta Kebankrapan 1967 tiada mengandungi peruntukan untuk membolehkan pelepasan bagi kes-kes terutamanya di mana bankrap tidak boleh dikesan, ketiadaan nombor kad pengenalan si bankrap, si bankrap telah tua dan lain-lain lagi ... Kerajaan berharap denagan meminda peruntukan mengenai pelepasan bankrap, kes-kes lama yang tidak aktif dapat ditutup dan seterusnya dapat mengurangkan kes-kes lama yang tertunggak. Beban kerja di Jabatan Pemegang Harta juga akan dapat diringankan dan sumber manusia dapat diagih serta digunakan sepenuhnya untuk mengendalikan kes-kes aktif yang lebih penting.

[17] The bankrupt JD was absent both during the application before the learned senior assistant registrar and in this appeal.

FINDINGS OF THE COURT

[18] Sections 33A and 33B of the Bankruptcy Act 1967 read as follows:

> 33A Discharge of bankrupt by Certificate of Director General of Insolvency
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> (1) The Director General of Insolvency may, in his discretion but subject to section 33B, issue a certificate discharging a bankrupt from bankruptcy.
>
> (2) The Director General of Insolvency shall not issue a certificate discharging a bankrupt from bankruptcy under subsection (1) unless a period of five years has lapsed since the date the receiving order and the order by which he was adjudged bankrupt were made.
>
> (3) Notice of every discharge under subsection (1) shall be given by the Director General of Insolvency to the Registrar and the Director

General of Insolvency shall advertise the notice in a local newspaper as prescribed.

(4) The Director General of Insolvency shall, upon the application of any interested person, issue a copy of the certificate of discharge to the applicant upon payment of the prescribed fee.

33B Objection of creditor to discharge of bankrupt under section 33A

(1) Before issuing a certificate of discharge under section 33A, the Director General of Insolvency shall serve on each creditor who has filed a proof of debt a notice of his intention to issue the certificate.

(2) A creditor who has been served with a notice under subsection (1) and who wishes to object to the issuance of a certificate discharging the bankrupt shall, within twenty-one days from the date of service of the notice, furnish a notice of the objection stating the grounds of his objection.

(3) A creditor who does not furnish a notice of his objection and the grounds of his objection in accordance with subsection (2) shall be deemed to have no objection to the discharge.

(4) A creditor who has furnished a notice of his objection and the grounds of his objection in accordance with subsection (2) may, within twenty‐one days of being informed by the Director General of Insolvency that his objection has been rejected, make an application to the court for an order prohibiting the Director General of Insolvency from issuing a certificate of discharge.

(5) Every application under subsection (4) shall be served on the Director General of Insolvency and on the bankrupt and the court shall hear the Official Assignee and the bankrupt before making an order on the application.

(6) On an application made under subsection (4), the court may, if it thinks it just and expedient –

(a) dismiss the application;

(b) make an order that for a period not exceeding two years a certificate of discharge shall not be issued by the Director General of Insolvency.

[19] From my reading of ss 33A and 33B of the Bankruptcy Act 1967, the DGI does not have the absolute discretion to issue the certificate of discharge. The DGI's exercise of the discretion is plainly subjected to the provisions in s 33B. It must be made judiciously depending on the circumstances of each case. In the Supreme Court case of *Savrimuthu v Public Prosecutor* [1987] 2 MLJ 173, Salleh Abas LP held that public interest, reason and justice demand that any statutory power must be exercised reasonably and with due consideration.

[20] I am aware that the JD who is now 61 years of age has been a bankrupt for the past 17 years. The DGI has twice written to the JD at his last known address but there was no response whatsoever from him. This is suggestive that the bankrupt JD could not be located.

[21] However from the information furnished by the JC, it is clear that that the JD has been and is still gainfully employed as a lecturer in Olympia Business School in Penang. In other words, he is traceable. I am thus not satisfied that the DGI has utilised all reasonable endeavours to locate him including making internet searches in this modern day of information technology. From the evidence adduced, the DGI has merely written two letters to the JD, to wit: once in 1999 and again in 2012. No other attempts were made to procure his attendance at the Insolvency Department.

[22] In the circumstances, this is the situation of an un-administered estate in bankruptcy by reason that the procedures such as meeting of creditors, public examination of debtor and other administrative tasks as laid down in ss 15–17 and 40–69 of the Bankruptcy Act 1967 have not yet been undertaken todate. This can easily be contrasted with the s 33A case of *Re Endon Tamseran; ex p Parkash Singh Wasawa Singh* relied by the DGI where all the assets of the bankrupt who was then 65 years old had been realised and there was no longer any more contribution pursuant to the administration of the estate.

[23] That notwithstanding, I also took into consideration the plight of the JC in that there has been no recovery of the judgment debt todate from the JD which ought to have been the dividends paid out from the realisation of the assets of the JD. If the certificate of discharge is issued, the JD gets off scot-free. It is also too late in the day for the JC to seek other modes of enforcement of judgment pursuant to O 45–O 52 of the Rules of Court 2012 by virtue of the Limitation Act 1953.

[24] In the premises, I find it is just and expedient that the appeal should be allowed. Accordingly the DGI should forthwith procure the attendance of the bankrupt JD and commence the administration of the estate in bankruptcy.

[25] In allowing the appeal, I am mindful that s 33B(5) of the Bankruptcy Act 1967 has not been fully complied in that the bankrupt JD has not been served with the application and did not appear at the hearing or the appeal. In my view, the provision of service and appearance are only directory particularly in light of the special circumstances of this case. In *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1991] 3 MLJ 28; [1991] 2 CLJ 1199, Edgar Joseph Jr J (later FCJ) said as follows:

> Accordingly, in my approach to the question whether the requirements of r 3 are mandatory or directory I must ask myself the further question whether the

requirements are vital and go to the root of the matter in which case they would be mandatory and therefore a breach thereof cannot be condoned for, as HS Ong FJ said in *Re Tan Boon Liat* [1977] 2 MLJ 108; [1977] 1 LNS 110 at p 116:

there are mandatory rules, even of procedure, which cannot be passed over lightly as irregularities, because they are incurably illegal as being in contravention of strictly imperative provisions.

If the requirements of r 3 are not mandatory, they would be directory only and a breach thereof could be condoned provided there is substantial compliance with the requirements read as a whole and provided no prejudice ensues.

I derive support for the approach I propose adopting from the Indian Supreme Court decision in *Pratap Singh v Sri Krishnan AIR* (1956) SC 140 where the appellant was a candidate for the office of President of a Municipal Committee. The nominations were made on forms which were old forms requiring the caste of the candidate to be stated, whereas the changed rule required the occupation of the candidate to be stated. All candidates filed their nominations in the old forms, but the respondent who knew the change in the law, struck out the word 'caste' put in 'occupation' and gave his occupation. The appellant having been elected, the respondent challenged the election and the High Court, on appeal, set aside the election. Allowing the appeal, the Supreme Court held:

We do not think that any failure to comply with any of the provisions set out in the various rules is fatal, and we deprecate this tendency towards technicality; it is the substance that counts and must take precedence over mere form. Some rules are vital and go to the root of the matter: they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as a whole and provided no prejudice ensues; and when the legislature does not itself state which is which Judges must determine the matter, and, exercising a nice discrimination, sort out one class from the other along broad based common sense lines.

Similarly, in the *Privy Council case of Punjab Co-operative Bank Ltd, Amritsar v CIT Lahore AIR* (1940) PC 230, Viscount Maugham referred to the same principle in these terms:

It is a well settled general rule that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

So, also, in *Liverpool Borough Bank v Turner* (1861) 30 LJ Ch 379, Lord Campbell said:

No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with the implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed. (Emphasis added.)

[26] Be that as it may, the attendance of the JD is in my view immaterial here because the administration of the estate in bankruptcy has never even

commenced at all. This is unlike a partly or wholly administered estate wherein the representation of the bankrupt would be a vital factor to take into account whether to discharge the bankrupt.

CONCLUSION

[27] It is for the foregoing reasons that I have allowed the appeal as so ordered.

Appeal allowed.

Reported by Kanesh Sundrum